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Library & Research Service

Bill Digest

Companies (Rescue Process for Small and Micro Companies) Bill 2021

Bill No. 92 of 2021

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Abstract

The *Companies (Rescue Process for Small and Micro Companies) Bill 2021* provides for a new dedicated rescue process for small and micro companies. The Bill aims to deliver a more accessible and cost efficient framework than the existing examinership process to assist viable small and micro companies to remain in business while trading through periods of temporary difficulty.

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Glossary and abbreviations

Table 1: Glossary & Abbreviations

Glossary & Abbreviations	
CBI	Central Bank of Ireland
CLRG	Company Law Review Group
Cross Class Cram Down	Cross class cram down is where one class of impaired creditor votes in favour of the plan, this decision can then be imposed on all classes of creditors
CRO	Companies Registration Office
DPP	Director of Public Prosecutions
ESRI	Economic and Social Research Institute
Examinership	A company which is in examinership is under scrutiny by an examiner so that he/she can report back to the High Court with proposals for the company's survival. Examinership is a mechanism provided for the rescue and return to health of ailing, but potentially viable companies.
PRD	Preventive Restructuring Directive
Principal Act	*Companies Act 2014*
RIA	Regulatory Impact Analysis
SCARP	Small Company Administrative Rescue Process
SME	Small and Medium-Sized Enterprises A 'micro company' as defined under the *Companies Act 2014* is one where two of the following conditions are satisfied: (a) the amount of the turnover of the company does not exceed €700,000 (b) the balance sheet total of the company does not exceed €350,000 (c) the average number of employees of the company does not exceed 10. A 'small company' as defined under the *Companies Act 2014* is one where two of the following conditions are satisfied: (a) the amount of the turnover of the company does not exceed €12m (b) the balance sheet total of the company does not exceed €6m (c) the average number of employees of the company does not exceed 50. A 'medium company' as defined under the *Companies Act 2014* is one where two of the following conditions are satisfied: (a) the amount of the turnover of the company does not exceed €40m (b) the balance sheet total of the company does not exceed €20m (c) the average number of employees of the company does not exceed 250.

Summary

- The primary purpose of this legislation is to introduce a new dedicated rescue plan for small and micro companies which is more accessible, quicker and affordable than the existing examinership process. This will assist viable small and micro companies to remain in business while trading through periods of temporary difficulty.
- Corporate restructuring and insolvency processes in Ireland are mostly governed under the *Companies Act 2014*. The examinership process presents the most commonly used framework to date in which corporate rescue and restructuring takes place.
- Covid-19 has had a significant impact on the domestic economy with the largest declines in sectors with a high dependence on social contact including the arts, hotels, bars and restaurants and high-street retailers. This is particularly relevant to small and micro enterprises with 78% operating in sectors moderately or highly affected by the pandemic.
- The Tánaiste and Minister for Enterprise, Trade and Employment, Leo Varadkar TD wrote to the Company Law Review Group (CLRG) on 8 July 2020 requesting it to consider the issue of rescue for small businesses. The CLRG reported back to the Minister in October 2020 and set out its recommendations for a proposed new process for the rescue of small companies, distinct from the existing examinership legislation. Their report helped inform the development of the General Scheme.
- The Department of Enterprise, Trade and Employment carried out a public consultation on the proposed Summary Rescue Process on 8 February 2021 to inform the further development of the General Scheme. The consultation closed on 5 March 2021 with the Department receiving 17 submissions from a mixture of business representatives, insolvency practitioners and other stakeholders.
- The Regulatory Impact Analysis of the Bill has indicated costs ranging from €80,000 - €120,000 for the average examinership, while the Small Company Administrative Rescue Process (SCARP) to be put in place by the Bill is estimated to cost in the region of €20,000 - €50,000, dependent on creditor engagement and the number of court applications required by a particular company.
- Under the Bill, an insolvency practitioner (who must be qualified to act as liquidator under the *Companies Act)* is appointed by the company to begin engagement with creditors and prepare a rescue plan. The rescue plan must satisfy the 'best interest of creditors' test and provide each creditor with a better outcome than a liquidation. In addition to this, no creditor may be unfairly prejudiced by the plan.
- Repudiation of onerous contracts, including leases, is provided for in the Bill subject to court oversight as appropriate.
- The new rescue process under the Bill includes State creditors such as the Department of Social Protection and the Revenue Commissioners, though they may opt out of the process on specified statutory grounds.

Introduction

The Companies (Rescue Process for Small and Micro Companies) Bill 2021 was published on 25 June 2021. The Government provided further details on the drafting of the Bill on 19 May 2021. Announcing further information on the Small Company Administrative Rescue Process (SCARP), Minister of State for Trade Promotion, Digital and Company Regulation, Robert Troy TD stated that:[1]

> "Government are determined to introduce SCARP as soon as possible so I want to ensure a high level of transparency so that businesses and stakeholders understand SCARP and the rationale behind it. In designing a new rescue process for small and micro companies, my department considered the Company Law Review Group report and opened a public consultation on several matters including the inclusion of repudiation in an administrative process and the status of State creditors. I believe we have struck the right balance to develop a simplified and effective process that will assist viable companies to restructure and remain in business."

Announcing the Government approval of the publication of the Bill on 22 June 2021, the Minister of State commented that:[2]

> "All viable companies should have reasonable access to corporate rescue and I am pleased we are now in a position to progress with The Companies (Rescue Process for Small and Micro Companies) Bill. This legislation is a key part of Government's response to the economic impact of Covid-19 and provides for a rescue framework (SCARP) aimed at small and micro companies, many of which have faced significant challenges throughout the pandemic and continue to face challenges as the economy reopens.
>
> SCARP incorporate key elements of the existing examinership model in an administrative context thus reducing court oversight where creditors are engaged in the process and positively disposed to a rescue plan. While court involvement is limited, I am conscious the issue of corporate rescue extends far beyond the distressed company itself, therefore the process incorporates robust safeguards and allows for access to the courts at appropriate junctures. I believe it balances the needs of all stakeholders affected by corporate rescue. For example, the Bill provides that state creditors will operate on an "opt-out basis" on prescribed grounds such as if the company has a poor history of tax compliance. This

[1] See Department of Enterprise, Trade and Employment, Press Release, "Minister Troy welcomes publication of further information on Small Company Administrative Rescue Process" (19 May 2021). Available at:

https://www.gov.ie/en/press-release/60d55-minister-troy-welcomes-publication-of-further-information-on-small-company-administrative-rescue-process/

[2] See Department of Enterprise, Trade and Employment, Press Release, "Minister Troy to publish legislation to provide for dedicated rescue framework for small and micro companies" (23 June 2021). Available at:

https://enterprise.gov.ie/en/News-And-Events/Department-News/2021/June/20210622.html

> should provide comfort to business that the State will not remove itself from the process for arbitrary reasons."

The Explanatory Memorandum for the Bill notes that the purpose of the Bill is:[3]

> "to provide an alternative to examinership, for the benefit of small and micro companies, which is more accessible and cost efficient than the existing examinership process and capable of conclusion within a shorter period of time and to assist viable small and micro companies to remain in business while trading through periods of temporary difficulty."

[3] Explanatory Memorandum for the Companies (Rescue Process for Small and Micro Companies) Bill 2021. Available at https://www.oireachtas.ie/en/bills/bill/2021/92/?tab=bill-text.

Key provisions of the Bill

According to the Department of Enterprise, Trade and Employment, the main provisions of the Bill can be summarised as follows:[4]

- Introduces a new dedicated rescue plan for small and micro companies (as defined by the *Companies Act 2014*). Such companies account for over 99% of Irish enterprises with micro enterprises alone making up around 92%.
- Commences the rescue plan by resolution of directors rather than by application to Court.
- An insolvency practitioner (who must be qualified to act as liquidator under the *Companies Act)* is appointed by the company to begin engagement with creditors and prepare a rescue plan. The rescue plan must satisfy the 'best interest of creditors' test and provide each creditor with a better outcome than a liquidation.
- Creditors are invited to vote on the rescue plan by day 49 of the insolvency practitioner's appointment. The proceedings in relation to the required meetings of creditors are in keeping with existing provisions of the *Companies Act*.
- The rescue plan is approved without the requirement for court approval provided that 60% in number and value of an impaired class of creditors vote in favour of the proposal and no creditor raises an objection to the plan within the 21-day cooling off period which follows the vote. The approval mechanism is drawn from examinership and provides for a cross class cram down. This means that where one class of impaired creditor votes in favour of the plan, this decision can then be imposed on all classes of creditors.
- Where an objection to the rescue plan is raised, there is an automatic obligation on the company to seek the court's approval. This acts as a safeguard for creditors.
- Repudiation of onerous contracts, including leases, is provided for subject to court oversight as appropriate.
- Concluded within a shorter period than examinership (examinerships can currently run for up to 150 days, SCARP seeks to arrive at a conclusion within a shortened timeframe, subject to extension where necessary for court applications),
- Has safeguards against irresponsible and dishonest director behaviour. The process will be within scope of existing reckless trading provisions. The Director of Corporate Enforcement has a suite of powers to examine books and investigate, as appropriate, in line with that which is provided for in relation to liquidations, receiverships and examinerships.
- Includes State creditors such as the Department of Social Protection and the Revenue Commissioners. They may opt out of the process on specified statutory grounds.

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[4] See Department of Enterprise, Trade and Employment, Press Release, "Minister Troy to publish legislation to provide for dedicated rescue framework for small and micro companies" (23 June 2021). Available at: https://enterprise.gov.ie/en/News-And-Events/Department-News/2021/June/20210622.html

Table of provisions

A summary of the Bills' provisions is included in Table 2 below.

Table 2: Summary of provisions contained in the Bill

Section	Title	Effect
Part 1: General		
1.	Short title and commencement	This is a standard provision and provides that, if enacted, this Bill will be cited as the Companies (Rescue Process for Small and Micro Companies) Act 2021. It will be commenced by ministerial order and different provisions may be commenced at different times.
2.	Definition	In this Act, "Principal Act" means the *Companies Act 2014*.
Part 2: Rescue process for small and micro companies		
3.	Rescue process for small and micro companies	Section 3 of the Bill inserts Part 10A into the Principal Act (see section below on Principal provisions of the Bill for a detailed discussion of this Part). It also sets out definitions for Part 2.
Part 3: Miscellaneous amendments of *Companies Act 2014*		
4.	Amendment of section 2 of Principal Act	Section 4 of the Bill Inserts the definition of process adviser into section 2 of the Principal Act.
5.	Amendment of section 511 of Principal Act	Section 5 of the Bill is a technical amendment substituting "dissipation" for "disappearance" in section 551(3)(d) of the Principal Act.
6.	Amendment of section 587 of Principal Act	Section 6 of the Bill amends section 587 of the Principal Act to oblige the company to ensure creditors in a creditors' voluntary liquidation are made aware of their right to form and participate on a committee of inspection which represents the interests of all creditors of a company going into liquidation. If default is made by the company in complying with, inter alia, subsection (3), the company and any officer of it who is in default shall be guilty of a category 3 offence.
7.	Amendment of section 610 of Principal Act	Section 7 of the Bill amends section 610 of the Principal Act to bring the small company

		administrative rescue process within scope of reckless trading. It means that the process adviser is empowered to make an application to court in this regard.
8.	Amendment of section 627 of Principal Act	Section 8 of the Bill amends section 627 of the Principal Act to provide clarity that a liquidator has the power to bring or defend any proceedings before the Workplace Relations Commission and the Labour Court in the name and on behalf of the company.
9.	Amendment of section 666 of Principal Act	Section 9 of the Bill amends section 666 of the Principal Act to: • provide for an obligation to be placed on liquidators to ensure creditors in a court ordered liquidation are made aware of their right to form and participate on a committee of inspection; • explicitly provide that where a committee of inspection is appointed it shall include not less than one employee creditor member ("employees' representative") to represent employee creditors, should they so elect; and • where a liquidator, without reasonable excuse, fails to inform creditors of their entitlement to form and participate on such a committee that they will be guilty of a category 4 offence (and liable on summary conviction, to a class A fine (up to €5,000).
10.	Amendment of section 667 of Principal Act	Section 10 of the Bill amends section 667 of the Principal Act to explicitly provide that where a committee of inspection is appointed it must include not less than one employee creditor member ("employee's representative") to represent employee creditors, should they so elect.
11.	Amendment of section 668 of Principal Act	Section 11 of the Bill amends section 668 of the Principal Act to provide that where: • a committee of inspection is appointed,

		• has an employees' representative member, and • where the employees' representative member vacates the role, they may be replaced by another employees' representative should the employees so elect. Section 668 of the Principal Act applies to a committee of inspection appointed in a court winding up and a creditors' voluntary liquidation.
12	Amendment of section 690A of Principal Act	Section 12 of the Bill amends section 690A of the Principal Act. Section 690A provides for creditors' meetings to be held virtually during an interim period for the duration of the Covid-19 pandemic. This amendment ensures meetings held under the small company administrative rescue process can be held virtually during the interim period.

Source: Library & Research Service, 2021

Existing legislative framework

Corporate restructuring and insolvency processes in Ireland are mostly governed under the *Companies Act 2014*. The examinership process presents the most commonly used framework in which corporate rescue and restructuring takes place (Part 10 of the *Companies Act 2014*). In addition, Part 9 of the *Companies Act 2014* provides a process which can be used to restructure companies in certain situations (known as Schemes of Arrangement).

The key differences between Part 9 and Part 10 rescue processes are shown in Table 3 below.

Table 3: Comparison between Part 9 and Part 10 schemes

	Part 9 scheme	Part 10 scheme
Who originates it?	Originated by (full) Board of Directors of the company using existing advisers. Scheme proposals sent to company shareholders or creditors for approval.	Examinership is usually initiated on the application of the directors of the company. The Examiner, having been appointed by the High Court (or Circuit Court as described above) originates the scheme.
Is there an insolvency practitioner to supervise the process	No.	Yes, the Examiner.
Is an independent expert's report required	No, but it is usual when the Court is finally considering whether to approve the scheme, where there are continuing directors.	Yes, as part of the application to commence the examinership.
Who are the "independent directors"?	Directors unconnected with the continuing shareholders (the acquirer or investor in a restructuring) constitute themselves as a committee of independent directors, taking advice as to the fairness of the scheme from an independent financial adviser or accountant.	Unusual for there to be such a Committee.
What majorities are required for the	(i) A majority in number of the voting shareholders or creditors, as the case may be	A simple majority in value of one class of creditor whose rights have been impaired under the proposed scheme

proposal to succeed?	(ii) which majority must hold at least 75% of the shares of the voting shareholders or 75% of the debt of the voting creditors.	
Can the vote of one class affect the rights of another class	No. However in English schemes there is only usually one class of creditors given the flexibility of the schemes which enables (i) the payment of crucial creditors and (ii) the disregard of 'out-of-the-money' creditors.	Yes.
What Court approvals are necessary?	Court approval is required: (i) to obtain approval of the scheme; (ii) if a stay on proceedings is sought.	Court approval is required (i) to commence an examinership (ii) to continue the period of protection beyond 70 days; (iii) to approve the scheme.
Is there a stay of proceedings against the company	No, save as may be ordered by the Court upon special application by the company, its directors, a member, a creditor and where the company is in liquidation, by the liquidator.	Yes, automatically upon the company going into examinership.
What is the effect of there being separate classes of or distinctions between shares and types of creditor?	The company is responsible for constituting proper classes of shareholders or creditors, as the case may be. This may be approved by the Court but does not have to be post 2014. Proprietary directors always constitute a separate class.	The Examiner will constitute the classes of shareholders and creditors. The class of shareholders is usually irrelevant as they will have their interest nullified economically. Each class of creditor will receive a dividend from the scheme, as proof that it is a better outcome than a winding up.
What is the Court's approach to the fairness or otherwise of a proposal?	A Court will approve the scheme where it is satisfied that the scheme is fair to shareholders or creditors, as the case may be. A similar unfair prejudice test can be used as with examinerships.	A Court will approve the scheme where it is satisfied that the scheme provides a better outcome for creditors than a winding up and that the company has a reasonable chance of survival.

Who pays the fees?	The company.	The company.
What dictates the timetable?	Timetable affected by Court dates.	Timetable laid down by statute.

Source: Company Law Review Group, 2020

At EU level, the new Preventive Restructuring Directive (PRD) aims to reduce barriers for cross border investment, reduce the cost of insolvency and support efforts to reduce non-performing loans. According to the Department of Enterprise, Trade and Investment, the current system of examinership in Ireland reflects many of the provisions within the Directive which must be transposed by 17 July 2021 (although a moratorium period is provided for until June 2022).[5]

The Directive contains several key measures:

- **Early warning and access to information** to help debtors detect circumstances that could give rise to a likelihood of insolvency and signal to them the need to act quickly.
- **Preventive restructuring frameworks**: debtors will have access to a preventive restructuring framework that enables them to restructure, with a view to preventing insolvency and ensuring their viability, thereby protecting jobs and business activity. Those frameworks may be available also at the request of creditors and employees' representatives.
- **Facilitating negotiations on preventive restructuring plans** with the appointment, in certain cases, of a practitioner in the field of restructuring to help in drafting the plan.
- **Restructuring plans**: the new rules foresee a number of elements that must be part of a plan, including a description of the economic situation, the affected parties and their classes, the terms of the plans, etc.
- **Stay of individual enforcement actions**: debtors may benefit from a stay of individual enforcement actions to support the negotiations of a restructuring plan in a preventive restructuring framework. The initial duration of a stay of individual enforcement actions shall be limited to a maximum period of no more than four months.
- **Discharge of debt**: over-indebted entrepreneurs will have access to at least one procedure that can lead to a full discharge of their debt after a maximum period of 3 years, under the conditions set out in the directive.

[5] Department of Enterprise, Trade and Employment, *Public Consultation on the Transposition of Directive (EU) 2019/1023 of the European Parliament and Council on preventive restructuring frameworks, insolvency and discharge of debt* (January 2020). Available at:
https://enterprise.gov.ie/en/Consultations/Consultations-files/Public-consultation-on-Directive-2019-1023.pdf

Policy background

Economic outlook

According to the Central Bank of Ireland (CBI), output declined in all sectors of the domestic economy in 2020, with the largest declines in sectors with a high dependence on social contact including the arts, hotels, bars and restaurants and high-street retailers.[6] This is particularly relevant to small and micro enterprises with 78% operating in sectors moderately or highly affected by the pandemic.[7]

In terms of the future economic outlook for the sector, the Department of Enterprise, Trade and Employment note that:[8]

> "Over 200,000 Irish enterprises operate in sectors with direct or intermediate levels of exposure to the economic impact of the pandemic. Research conducted by the Central Bank at the onset of the pandemic estimated a three-month SME liquidity shortfall of between €2.4 and €5.7 billion due to the crisis. Restrictions have persisted beyond this point and financial shortfalls are likely to have expanded beyond the Central Bank's initial estimates. A recently published survey by the Central Bank and ESRI has found that almost a quarter of SMEs could be vulnerable to liquidation when insolvency criteria normalise. Half of SMEs are estimated to hold 5% or less of annual turnover in reserve, with a quarter of SMEs holding less than 1%."

The Department further states that:[9]

> "The cumulative effect of government supports, loan payment breaks, forbearance from creditors, and pre-existing financial buffers have likely held back insolvency levels with commentators suggesting a number of 'zombie' companies who have not formally entered into insolvency but have permanently ceased trading. Government support to date has largely focused on the immediate liquidity crisis faced by firms, but as the crisis has persisted for more than a year it has evolved into a solvency crisis for some enterprises in particularly hard-hit sectors. Analysis undertaken by the Department of Enterprise, Trade

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[6] Central Bank of Ireland, *Quarterly Bulletin* (April 2021). Available at:
https://www.centralbank.ie/docs/default-source/publications/quarterly-bulletins/qb-archive/2021/quarterly-bulletin-q2-2021.pdf?sfvrsn=6

[7] Central Bank of Ireland, *SME liquidity needs during the COVID-19 shock* (April 2020). Available at:
https://www.centralbank.ie/docs/default-source/publications/financial-stability-notes/no-2-sme-liquidity-needs-during-the-covid-19-shock-(mcgeever-mcquinn-and-myers).pdf?sfvrsn=6

[8] Department of Enterprise, Trade and Employment, *Regulatory Impact Analysis: Small Company Administrative Rescue Process and Miscellaneous Provisions Bill 2021* (May 2021). Available at:
https://enterprise.gov.ie/en/Legislation/General-Scheme-SCARP.html

[9] Department of Enterprise, Trade and Employment, *Regulatory Impact Analysis: Small Company Administrative Rescue Process and Miscellaneous Provisions Bill 2021* (May 2021). Available at:
https://enterprise.gov.ie/en/Legislation/General-Scheme-SCARP.html

and Employment indicates that when the economy reopens, these firms may not be in a position to take on further debt or source adequate equity injections, which will likely lead to higher reported insolvency rates. While insolvency rates remained largely static in 2020, figures for Q1 2021 have shown a notable increase in the number of insolvent firms."

Company Law Review Group

The Tánaiste and Minister for Enterprise, Trade and Employment, Leo Varadkar TD wrote to the Company Law Review Group (CLRG) on 8 July 2020 requesting it to consider the issue of rescue for small businesses, following on commitments in the programme for Government. After deliberation**,** the Review Group determined that its efforts should be focussed on modelling the new process on the examinership framework rather than focussing on Part 9 Schemes.

The CLRG completed its work and reported back to the Minister on 24 October 2020. The report set out its recommendations for a proposed new process for the rescue of small companies, distinct from the existing examinership legislation.[10]

The CLRG recommendations, which helped inform the design of the General Scheme, included the following:

- The process should be distinct from examinership and have a separate name, which the Review Group recommends be the "Summary Rescue Process".
- The procedure should be available to "small companies" as defined in the Principal Act, meaning companies that satisfy two of these three criteria:
    - annual turnover of up to €12 million;
    - a balance sheet total of up to €6 million;
    - up to 50 employees.
- The procedure should commence by a resolution of the company's directors rather than by an application to Court as in examinership.
- Instead of running for 70 to 100 days (or longer under the *Companies (Miscellaneous Provisions) (Covid-19) Act 2020*, which enables up to 150 days) as in examinership, the procedure should aim to conclude within a shorter period.
- The company's directors should commence the process following advice from a qualified insolvency practitioner as to the company's viability, subject to a compromise with creditors and/or introduction of new capital.

[10] Company Law Review Group, *Report Advising on a Legal Structure for the Rescue of Small Companies* (October 2020). Available at:
http://www.clrg.org/clrg/publications/the-company-law-review-group-s-special-report-on-the-rescue-of-small-business.pdf

- The insolvency practitioner should oversee the procedure and assist the company's directors in preparing a rescue plan for approval by creditors.
- A vote of the creditors to support a rescue plan should be required, by a 50% +1 majority in value as in examinership, rather than the 75% vote required in a scheme of arrangement under Part 9 of the Principal Act.
- Cross class cram down of debts should be available as part of the procedure.
- Court approval of any cross class cram down should be required in the formats proposed, designed with a view to reducing costs.
- The possibility of approval of a rescue plan without an application to Court should be examined, provided there is no objection from any creditor involved.
- The safeguards against irresponsible and dishonest behaviour of directors that apply in liquidation should apply to this process.

As part of its work on the development of a new corporate rescue process, the CLRG listed the key differences between a Part 9 scheme and examinership compared to its proposals for a new Summary Rescue Process. These are shown in Table 4 below.

Table 4: Key Differences between a Part 9 scheme and Examinership compared to Summary Rescue Process

Part 9 scheme	Examinership
A Summary Rescue Process would differ from a Part 9 scheme by: - having a qualified insolvency practitioner negotiate and develop the rescue plan; - having a more detailed commencement process; - having specific filing obligations; - adjusting the majority required to approve the scheme from the "special majority" of majority in number and 75% by value to 50%+1 in value only; - having different approval criteria mirrored on the examinership process - having different possibilities in relation to Court approval processes. - having a more prescribed engagement with a supervisory	A Summary Rescue Process would differ from an examinership by: - not requiring commencement by order of the Court; - having particular commencement stages; - not having an automatic stay – but note the proposal for a requirement for Court consent to issue or progress proceedings; - having different filing requirements with CRO and Revenue; - having different approval processes; - potentially not including the repudiation of onerous contracts,

authority, with the CRO and with the Revenue Commissioners.	which is possible in an examinership.[11]

Source: Company Law Review Group, 2020

Public consultation

The Department of Enterprise, Trade and Employment carried out a public consultation on the proposed Summary Rescue Process on 8 February 2021 to inform development of the General Scheme. The consultation closed on 5 March 2021 with the Department receiving 17 submissions from a mixture of business representatives, insolvency practitioners and other stakeholders.

According to the summary consultation report, two main issues emerged which significantly impacted the development of the General Scheme:[12]

> "Firstly, several respondents advocated for the **inclusion of repudiation provisions**. Repudiation is a legal mechanism which allows the Court to set aside onerous contracts in examinership. While the Department had initially considered this too complex for a simplified process, upon consideration of the responses received the Department concluded that this required providing for in the General Scheme.
>
> Secondly, providing for **'excludable creditors'** under the new process was strongly opposed by many respondents. Excludable creditors are a special class of creditor who may sit outside of the process. The Department considered there was merit in mirroring this concept in the General Scheme. However, following consideration of submissions received, the Department developed a revised approach which is considered to address the points raised by respondents."

Issues were also raised about how the new process would interact with existing and future EU law and the degree to which the summary rescue process (SCARP) should be compliant with the PRD. The Department's response was that it would be premature to make policy decisions in relation to the PRD in this legislation but that SCARP will be examined in the context of the PRD transposition and should further alignment be considered necessary, amendments will be made at that point.

[11] A process for repudiation has since been provided for in the Companies (Rescue Process for Small and Micro Companies) Bill 2021.

[12] Department of Enterprise, Trade and Employment, *Summary Rescue Process Public Consultation Report* (May 2021). Available at:

https://enterprise.gov.ie/en/Legislation/General-Scheme-SCARP.html

Regulatory Impact Analysis (RIA)

The Department of Enterprise, Trade and Employment has published a Regulatory Impact Analysis (RIA) of the Bill.[13] The RIA considered two policy options:

1. Do nothing
2. Enact legislative measures

The RIA notes that the impact of no policy change would be:

> "Potential for substantial job losses across small and micro companies operating in sectors with high levels of exposure to pandemic related impacts."

It estimates that such companies (circa 200,000) currently employ around 788,000 workers.

Regarding the development of legislative measures, the RIA asserts that:

> "Business representatives have called for a process akin to examinership, but appropriately nuanced to meet the unique requirements of small and micro enterprises. Previous attempts were made to open up the examinership process to such companies by amending the *Companies Act 2014* to allow small and micro companies to initiate examinership in the Circuit Court rather than the High Court. This was intended to reduce associated costs thus making examinership a viable alternative to winding up for such companies. However, the amendment did not result in a corresponding increase in use. Therefore, provision of a separate process is justified."

In terms of costs, the RIA states that:

> "Discussions with practitioners on the Company Law Review Group indicate costs ranging from €80,000 - €120,000 for the average examinership, while SCARP is estimated to cost in the region of €20,000 - €50,000, dependent on creditor engagement and the number of court applications required by a particular company."

[13] Department of Enterprise, Trade and Employment, *Regulatory Impact Analysis: Small Company Administrative Rescue Process and Miscellaneous Provisions Bill 2021* (May 2021). Available at: https://enterprise.gov.ie/en/Legislation/General-Scheme-SCARP.html

Principal provisions of the Bill

This section of the Digest examines the main provisions of the Bill and in particular Section 3. The Bill comprises 3 parts and 12 sections. Part 1 of the Bill relates to the short title and commencement of the Bill along with necessary definitions. Part 2 of the Bill details the rescue process for small and micro companies. Part 3 of the Bill relates to miscellaneous amendments to the *Companies Act 2014*. A short synopsis of each provision is given in the Table of Provisions.

Rescue process for small and micro companies

Part 2 of the Bill sets out the rescue process for small and micro companies. Some of the main provisions of this section are now provided below.

Interpretation

Section 3 (Chapter 1) of the Bill defines relevant terms for the purposes of the operation of the rescue process for small and micro companies.

Introductory

Section 3 (Chapter 2) sets out the eligibility criteria for companies seeking to avail of the Small Company Administrative Rescue Process and also the role of the process advisor in determining the viability of the company.

The principal eligibility requirements include:

- the company is, or is likely to be, unable to pay its debts,
- no resolution subsists for the winding up of the company,
- no order has been made for the winding up of the company,
- the company directors have not passed a resolution for the appointment of a process adviser in respect of the company during the 5-year period ending with the date on which it is proposed that such a resolution be passed by the company or no examiner has been appointed, and
- no petition for examinership is currently before a court or no examiner has been appointed to the company concerned.

In advance of passing a resolution to enter the process, the company directors must prepare a statement of affairs, in the prescribed form, detailing the financial and trading position of the company. Where any untrue statement has been included in the statement of affairs any director of the company who is in default will be guilty of a category 2[14] offence.

Where a process adviser determines that an eligible company has a reasonable chance of survival, they must prepare a detailed report in accordance with the criteria laid down in this

[14] Section 871(2) of the *Companies Act 2004* provides that a person guilty of category 2 offence will be liable (a) on summary conviction, to a class A fine (up to €5,000) or imprisonment for a term not exceeding 12 months or both, or(b) on conviction on indictment, to a fine not exceeding €50,000 or imprisonment for a term not exceeding 5 years or both.

section for the purpose of accurately assessing the position of the company, recommending an appropriate court in the event of any proceedings under Part 10A and making recommendations for next steps. This may include draft proposals for a rescue plan. The criteria laid out in the report are drawn from section 511 of the Principal Act which provides for the independent expert's report in examinership. The report and its recommendations are to be presented to the directors of the company.

Appointment of Process Adviser

Section 3 (Chapter 3) contains a number of provisions related to the appointment of the process adviser.

Section 558E provides that the company directors may hold a meeting within 7 days of having received the process adviser's report to vote on a resolution on whether to appoint a process adviser and commence the rescue process.

Section 558F provides that the process adviser, having been appointed by resolution of an eligible company, will keep the original determination as to the viability of the company under constant review. Where the process adviser determines that there is no longer a reasonable prospect of survival, they are required to inform the company directors and resign in accordance with the requirements of section 558ZW.

Section 558G provides that where the process adviser determines that there is no longer a reasonable prospect of the survival of the eligible company and informs the company directors under section 558F, the company directors are required to take such steps as they consider appropriate to protect the interests of the employees of the company.

Section 558H requires the process adviser to determine which court, the Circuit or High Court, is most appropriate for the purpose of any court applications required during the process. This determination is made in conjunction with the company directors and bearing in mind the associated costs to the company and the requirement to expedite the process.

Section 558I requires the process adviser to secure email addresses for specified relevant parties, primarily the creditors of the company.

Section 558J requires the process adviser, within 2 working days of their appointment, to formally notify the Registrar of Companies and the relevant court of his or her appointment and to arrange for publication of a notice of the appointment in Iris Oifigiúil and within 48 hours on any company website.

Section 558K provides that the process adviser must as soon as practicable, but no later than 5 days after the passing of the resolution, give to the persons prescribed by the Bill, principally creditors of the company, a notice of the resolution of the appointment of the process adviser, a copy of the process adviser's report, a statement on the relevant court for any proceedings which may be brought and a request to each creditor for all relevant information concerning outstanding debts, securities held and obligations.

Section 558L provides that as soon as practicable after the appointment, the process adviser must give a notice in writing to the creditor concerned requiring the creditor to inform the process adviser, within 14 days of the giving of the notice, if the creditor objects to the inclusion of the

excludable debt in the rescue plan. In this section excludable debt pertains to unpaid taxes and liabilities with respect to the Revenue Commissioners and the Department of Social Protection and other liabilities arising from the Redundancy Payments and Protection of Employees Acts.

Section 558M provides that where a receiver has been appointed for a period less than 3 days or a provisional liquidator stands appointed at the time of the resolution to appoint a process adviser, the process adviser may apply to the relevant court for a determination as to whether or not the receiver or provisional liquidator shall continue to stand appointed. This section provides that the relevant court may make such orders as it sees fit.

Unlike examinership, the small company rescue process does not afford a company an automatic period of protection from creditors because it is initiated outside of the courts. Section 558N provides that a company may however apply to the relevant court for a stay on proceedings and thus avail of the court's protection. This section also provides for the protection of creditors and their right to be heard and considered by the court prior to any decision.

Section 558O outlines the requirements of creditors to respond to and provide relevant information having received a notice of the process adviser's appointment and a request for details of outstanding debts owed by the company. This section also details the steps which the process adviser must follow to send reminders to creditors who have failed to respond to earlier notices and to subsequently estimate outstanding debts where creditors have not supplied any information or responded to requests for same. The process adviser must keep records of all such matters.

Rescue Plan

Section 3 (Chapter 4) of the Bill contains provisions relating to the formulation of a Rescue Plan.

Section 558P provides that where the process adviser considers it necessary for the survival of the company as a going concern that the relevant contract be repudiated, they have two options:

1. Subject to the approval of the relevant court the process adviser may repudiate the contract;
2. The process adviser can engage with the contracting party and follow the process outlined below.

The process adviser will provide written notice to the contracting party of the intention to repudiate the contract, the reasons underpinning the decision, informing them of their rights to object and to be heard in court and offering them the opportunity to propose alternative terms. The contracting party has 10 days within which to respond, or such shorter period as may be agreed.

Where the process adviser intends to pursue repudiation of the contract, they must provide written notice to the contracting party outlining for example the compensation proposed, that they may attend a meeting to consider the rescue plan and that in the event that the rescue plan is approved by a majority of creditors they have the right to object to the repudiation and compensation at that meeting.

Where the contract is a lease, the section sets out the grounds on which the process adviser will assess loss or damage.

Section 558Q requires the process adviser to formulate a rescue plan for the company. It provides for the detail which must be included in the plan, including how it is to be implemented. The

process adviser is required to treat all classes of creditors and members fairly, i.e. the rescue plan may not be unfairly prejudicial to any one class of person impaired. This is consistent with well-established principles in examinership.

Under section 558R, as concerns the leasing of land, the rescue plan or order of the court cannot contain proposals for a reduction in the amount of rent and/or the complete extinguishment of the right of the lessor to such payments. In the event of failure to make payments as regards outstanding leases, lessors shall not exercise any right (except in specific circumstances) to the repossession of land, to the forfeiture of lease or to the recovery of the amount of outstanding rent or damages arising.

These provisions do not apply where the lessor has agreed to the rescue plan.

Section 558S provides that in circumstances where the process adviser is unable to secure an agreement or formulate proposals for the rescue of the company, they are required to report this fact to the directors of the company. This report must include the reasons as to why a rescue plan could not be facilitated and a recommendation as to the next steps for the directors, up to and including the winding up of the company. This report must also be provided to creditors.

While the recommendation of the process adviser is not binding on the company, where the process adviser recommends that the company be wound up and the directors choose to continue to trade and there is a subsequent insolvent liquidation within 6 months of such recommendation, this fact may be taken into consideration by the courts when making a determination in respect of reckless trading under section 610 of the Principal Act.

Consideration of a Rescue Plan

Section 3 (Chapter 5) of the Bill contains provisions relating to the consideration of a Rescue Plan.

Under section 558T, the process adviser is required to call a meeting as soon as practicable of all creditors and members, either separately or jointly, to present a rescue plan for the company. This meeting must take place no later than 49 days after the date on which the process adviser is appointed.

Section 558U stipulates that the process adviser is required to give notice to all relevant parties of the members and creditors meeting no less than 7 days in advance of the meeting. This notice is to be accompanied by documents such as a copy of the rescue plan, a detailed statement of the assets and liabilities of the company, the estimated amount the creditor or member would receive in the event the rescue plan is unsuccessful and the company is wound up, the costs associated with the appointment of the process adviser and the rescue process. The notice must also detail for example, the procedures on how to object to, modify or agree with the rescue plan.

This section also requires the process adviser to make and retain records verifying that all of the requirements pertaining to this process have been met.

Section 558V defines the technical procedural requirements for a meeting held under section 558T.

Section 558W provides for a procedure for relevant parties to assign a proxy to act on their behalf in matters pertaining to the rescue process.

Section 558X details the miscellaneous requirements for the assignment of a proxy to be valid.

Section 558Y provides for the consideration by members and creditors at its meeting of a proposal for a rescue plan. It provides that a modification may be put to the meeting but may only be accepted with the consent of the process adviser.

The section also provides for a cross class cram down. This is drawn from comparable provisions in examinership but nuanced to provide flexibility for small and micro companies. It provides that a rescue plan will be binding on all members and creditors where it is accepted by 60% in number of one class of impaired creditors representing a majority in value of the claims and 21 days pass without any creditor triggering an objection to the plan in accordance with other provisions. Where such an objection is triggered, it will be for the court to confirm the plan.

This section also provides that:

- where a creditor or member does not vote, their abstention shall not be counted as a vote against the rescue plan;
- where a State authority is a creditor they shall be entitled to accept proposals even though the proposals may impair their claim.

Section 558Z provides that notification of the approval of the rescue plan must be provided within 48 hours of the approval of the plan to all relevant parties as prescribed - principally the creditors of the company. This section also details the content and items to be supplied as part of the notification requirement. A notice of the acceptance of the rescue plan must also be provided to the Registrar of Companies within 48 hours of the acceptance having been recorded.

Section 558ZA specifies that the process adviser must prepare a report as set out in the section after the conclusion of the meetings of the creditors and members. This report must be supplied within 49 days of the appointment of the process adviser and must be supplied to the company directors, the employees, the Director of Corporate Enforcement, the relevant court and any interested party who has requested a copy by writing. The courts may approve the omission of commercially sensitive information from the report being supplied to interested parties.

Objections to Rescue Plan

Section 3 (Chapter 6) of the Bill contains provisions relating to objections to a Rescue Plan.

Section 558ZB provides that a rescue plan becomes binding within 21 days of the filing of the approval of the rescue plan, unless an objection is lodged within that time period.

Section 558ZC provides that a creditor or member may file an objection to a rescue plan and that the objection be notified to the process adviser, and the office of the relevant court. This section also prescribes the grounds under which an objection may be made, including an objection made by contracting parties in respect of the repudiation of a contract.

Section 558 ZD provides for the court's role in the approval of a rescue plan where an objection is triggered and specifies those who may be heard by the court. This section further provides that the court may confirm, modify or refuse to confirm proposals for a rescue plan and that where the court upholds an objection under this section, it may make such orders as it sees fit.

Section 558 ZE provides that where the court dismisses an objection or approves modified terms of a rescue plan, it may make such orders for the implementation of its decision as it deems fit. Where an objection is dismissed, the rescue plan is deemed to come into immediate effect. Where

an objection is upheld and the rescue plan is modified the court may specify a commencement date for the modified plan, to be no later than 21 days after the rescue plan's approval. The court may also order the winding up of the company. The process adviser is required to file all resultant orders of the court with the Companies Registration Office.

Liability of third parties for debts of company

Section 3 (Chapter 7) of the Bill contains provisions pertaining to the liability of third parties for the debts of a company.

Section 558ZF provides for relevant definitions for Chapter 7 and savings.

Section 558ZG provides that, subject to section 558ZH(2), the provisions of this Chapter apply to any liability owed by a third party arising from a debt of a company engaged in the rescue process owed to another party.

Section 558ZH provides that the liability of the third person is not affected by the rescue plan.

Section 558ZI provides that the creditor of the company with respect to which a third person has liability, may not legally enforce that liability without having first given notice of an offer to the third person to transfer any rights the creditor may have to vote in meetings concerning the rescue plan and process.

Section 558ZJ provides that where a third person has made a payment to the creditor (i.e. compensated the creditor), in fulfilment of a liability arising from the non-payment by the eligible company of their debts to the creditor – any amount that would have been payable by the eligible company to the creditor, but for the compensation paid by the third party to the creditor, is now payable to the third party instead of the creditor.

Conclusion of rescue process

Section 3 (Chapter 8) of the Bill contains provisions providing for the conclusion of the rescue process.

Section 558ZK provides that the process adviser's appointment is terminated on conclusion of the process or such other events as provided for in the Bill.

Section 558ZL provides that if the company or any interested party discovers that the rescue plan was procured by fraud, then, within 180 days after the confirmation of the rescue plan, it can apply to the court to have the confirmation revoked. If it is so revoked, a certified copy of the order must be sent to the Registrar of Companies and the Director of Corporate Enforcement. The court may also direct that it be forwarded to any other person.

Section 558ZM mirrors section 557 of the Principal Act and allows the court to make an order to return assets which have been improperly transferred. If it can be shown to the satisfaction of the court that the effect of the disposal of any property of a company under court protection was to perpetrate a fraud on the company, its creditors or members, the court may order the return of that property or order the payment of a sum in respect of it to the process adviser.

Section 558ZN grants the Director of Corporate Enforcement the power to seek and examine the books and records of a company engaged in a rescue process as well as the books and records pertaining to the rescue process itself. Failure to provide such records constitutes an offence.

Section 558ZO provides that where a disciplinary tribunal of a professional body finds that a member of the body who acted as a process adviser failed to maintain appropriate records or, there are reasonable grounds for believing that the member committed a category 1[15] or 2 offence, that professional body is obliged to report such matters to the Director of Corporate Enforcement. This provision is in keeping with existing provisions of the Companies Act in respect of receivers, examiners, and liquidators.

Enforcement

Section 3 (Chapter 9) of the Bill contains provisions for enforcement.

Section 558ZP provides that it is an offence to act as a process adviser when the person concerned is not qualified under section 633 of the Principal Act.

Section 558ZQ provides that where a director of an eligible company fails to disclose relevant information which is material to the exercise by the process adviser of his or her functions or fails to exercise utmost good faith in his or her dealings with the process adviser the director shall be guilty of a category 2 offence.

Section 558ZR provides for the prosecution of criminal offences committed by officers and members of the company. If it appears to the process adviser that any past or present officer or member of the company has been guilty of an offence in relation to the company, the process adviser is obliged to report the matter to the Director of Public Prosecutions (DPP) and to the Director of Corporate Enforcement. Following on from this, the process adviser must give the DPP and the Director of Corporate Enforcement access to any information or facilities as may be required and if the DPP or the Director of Corporate Enforcement seeks to prosecute the case, the process adviser and all officers and agents of the company (past or present) must give all assistance in connection with the prosecution as they are reasonably able to give.

Powers of process adviser

Section 3 (Chapter 10) of the Bill contains provisions relating to the powers of the process adviser.

Section 558ZS details the powers of the process adviser and is based on section 524 of the Principal Act. It provides that any provision of the Act which applies to the rights and powers of a statutory auditor and the supplying of information to and co-operation with such auditor will apply to a process adviser.

The process adviser has the power to convene, set the agenda for and preside at meetings of the board of directors and general meetings of the company and may also propose motions or resolutions and give reports to such meetings. They are entitled to receive notice of and be heard at all meetings of the board of directors and general meetings of the company.

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[15] Section 871(1) of the *Companies Act 2004* provides that a person guilty of category 1 offence will be liable (a) on summary conviction, to a class A fine (up to €5,000) or imprisonment for a term not exceeding 12 months or both, or(b) on conviction on indictment, to a fine not exceeding €50,000 or imprisonment for a term not exceeding 10 years or both.

The process adviser may take whatever steps are necessary to halt, prevent or rectify the effects of any act, omission, course of conduct, decision or contract in relation to the income, assets or liabilities of the company which is or is likely to be to the detriment of the company, or any interested party. This power of the process adviser is subject to the right of parties acquiring an interest in good faith and for value in such income, assets or liabilities of the company.

Section 558ZT governs the production of such documents and evidence as the process adviser is empowered to request and which they consider relevant. For example, records concerning bank accounts into or out of which transactions may have taken place which pertain to the affairs of the company. This section also empowers the process adviser to examine under oath any agent of the company or other relevant person.

Section 558ZU provides that no person shall be entitled to withhold possession over any deed, instrument or document belonging to the company, including documents such as invoices, accounting records and so on, and no person or party may claim a lien over any such items. Where a mortgage, charge or pledge has been created by the deposit of any such document or paper with a person, the production of the document or paper to the process adviser by the person shall not operate to prejudice the person's rights under the mortgage, charge or pledge (other than any right to possession of the document or paper).

Section 558ZV allows the court to authorise the process adviser to dispose of property and is drawn from section 530 of the Principal Act. It enables the process adviser to dispose of assets which are subject to fixed or floating charges or hire-purchase agreements where such a disposal is likely to facilitate the survival of the whole or any part of the company as a going concern.

Section 558ZW defines the general conditions that apply when a process adviser resigns from the position. It specifies the content of a statement which must be served on the company. This provision mirrors section 400 of the Principal Act as it relates to the resignation of statutory auditors.

Where there are circumstances connected with the resignation that the process adviser concerned considers would warrant further inquiries with a view to proceedings under sections 610 and 611 or section 722 of the Principal Act, they are required to report the matter to the Director of Public Prosecutions and the Director of Corporate Enforcement.

Section 558ZX defines the general provisions of a procedural and technical nature relating to the actions of the process adviser. Provision is made for the resignation, removal, replacement, title and validation of actions of process advisers. It draws from section 532 of the Principal Act with some alteration to reflect the fact that the process adviser is appointed by way of passing of a resolution by the company directors rather than the court.

Process adviser: renumeration, costs and expenses

Section 3 (Chapter 11) of the Bill contains provisions relating to the renumeration, costs and expenses of the process adviser.

Section 558ZY provides for the court to authorise the remuneration, costs, and expenses of the process adviser.

Section 558ZZ provides for any creditor or member to apply to the court to review the remuneration, costs and expenses of the process adviser. Notice of the objection to the remuneration etc. must be sent in the prescribed form to the process adviser and the relevant court. If no notice is received within 21 days following the approval of the remuneration the amount shall be deemed to be fixed.

Section 558ZAA provides that any liabilities incurred by the company from the appointment of the process adviser shall be treated as expenses of the process adviser. This allows the company to continue to trade during the process and encourages creditors, such as suppliers, to continue to engage with the company.

Under section 558ZAB, liabilities incurred by the company as a result of the work of the process adviser and the remuneration, costs and expenses of the process adviser will take priority over all other outstanding claims.

General

Section 3 (Chapter 12) of the Bill provides for a number of general provisions.

Section 558ZAC suspends time limits set out in Chapter 10A while any matter is being considered by the courts.

Under section 558ZAD the process adviser or the Director of Corporate Enforcement may apply to the relevant court to make a determination concerning any question arising during the rescue process.

Section 558ZAE provides that all or part of any hearing in relation to the rescue process may be held other than in public if the court determines that, in the interests of justice, it would be in the interests of the company concerned or the creditors as a whole.

Section 558ZAF defines the capacity of the High Court to remit proceedings to the Circuit Court where it considers that the Circuit Court is a more appropriate venue.

Section 558ZAG affirms that section 185 of the Principal Act concerning the representation of bodies corporate at company meetings applies during the rescue process.

Under section 558ZAH, the process adviser must retain all records pertaining to the rescue process for a period of not less than 6 years.

Section 558ZAI defines the technical and procedural requirements for serving notices under the Act.

Section 558ZAJ defines the power of the Minister to bring regulations into effect to remove any difficulties in the implementation of the provisions of the Act.

International approaches

The report of the Companies Law Review Group considered different approaches which had been taken towards voluntary restructuring processes in other countries (see Appendix 4 of the report).[16] These are now reproduced below.

United Kingdom

In March 2020, the Corporate Insolvency and Governance Act was passed in the UK, which provides for some interim measures to address the difficulties of businesses and companies arising from Covid-19 effects. It also introduces an examinership-like statutory rescue process in a new Part 26A of their Companies Act 2006. (Part 26 deals with the scheme of arrangement provisions which are similar to Part 9 of the Irish Companies Act 2014). The key characteristics of this new process which is simply described as an arrangement or reconstruction, are these:

- a commencement process that is out of court
- a court order for the calling of classes of creditors and members
- voting by creditors, with approval by a 75% majority
- sanction by the Court of the compromise, and a cross class cram down

There is a moratorium available which is linked to the moratorium available under Part 1A of the Insolvency Act 1986 but it is not automatic and does not seem to be envisaged as being automatic. The Review Group did not consider that this model would provide any useful rescue process for small companies.

France

The French law for protection of companies gives companies that are facing economic, legal or financial difficulties and that are not yet in a situation of insolvency (where the company is not able to pay its debts) the means to deal with these difficulties in a preventive way.

Three preventive restructuring procedures are available to companies facing financial difficulties but not yet insolvent:

1. the ad hoc mandate
2. the conciliation
3. the safeguard, with its two variants, the accelerated financial safeguard and the accelerated safeguard

[16] Company Law Review Group, *Report Advising on a Legal Structure for the Rescue of Small Companies* (October 2020). Available at:
http://www.clrg.org/clrg/publications/the-company-law-review-group-s-special-report-on-the-rescue-of-small-business.pdf

Of these, the first two preventive procedures can be used: the “ad hoc mandate” and the “conciliation”, as out-of-court settlement proceedings.

In each procedure, the company’s management seeks to negotiate the company’s debts with the company’s creditors, under the aegis of a third party intermediary, who, depending on the procedure, will be either the ad hoc agent or the mediator and will be appointed by the President of the Court.

The company’s manager can only apply to the Court if the company has not made a declaration of cessation of payments and if the company has not been able to pay its debts for less than 45 days.

The company’s management stays in place and their powers and responsibilities are not displaced by the appointment of either the ad hoc agent or the mediator. There is no stay on proceedings under either procedure. The main difference between the ad hoc mandate and the conciliation is that a conciliation agreement will either be approved by the Court, which means that confidentiality is retained, or will be sanctioned by the Court, which renders the judgement public. The adverse effect of publicity, which is attached to the sanctioning of the agreement, is mitigated by the fact that such sanctioning confers more legal advantages than a mere approval in the event of subsequent insolvency proceedings being opened (e.g. protection for new money).

The Netherlands

The Dutch restructuring scheme (known as WHOA) is modelled on the English scheme of arrangement and has been enacted in light of the EU Preventive Restructuring Directive. Whether the process is covered by the Insolvency Regulation seems to be a matter of choice of the debtor. Comparative elements include the cessation of payments process, the idea of shareholders and creditors being divided into classes and a majority vote. However, in the Dutch process if shareholders representing at least two-thirds of the value of the issued capital in the debtor vote in favour the vote is carried and similarly a creditor's class is deemed to have voted in favour of the debt restructuring agreement if creditors representing at least two-thirds of the value of the outstanding claims vote in favour of the plan. It is envisaged that only those affected by the restructuring will vote. There is also a cross cram down possibility, but the Court must approve this plan.

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